IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA647/2020
[2021] NZCA 557

BETWEEN	ALUSI LIMITED First Appellant
	OPENYD LIMITED Second Appellant
	RUDAYNA IBRAHIM, ABDULAH ABDULQADIR AND OMAR JASSIM Third Appellants
AND	G J LAWRENCE DENTAL LIMITED First Respondent
	GARY JOHN LAWRENCE AND JASON PETER SILK AS TRUSTEES OF THE G J LAWRENCE FAMILY TRUST AND DIANE SHERYL LAWRENCE AND JASON PETER SILK AS TRUSTEES OF THE D S LAWRENCE FAMILY TRUSTS TOGETHER TRADING AS THE LAWRENCE FAMILY TRUSTS Second Respondents

Hearing:	10 June 2021
Court:	Cooper, Gilbert and Courtney JJ
Counsel:	C J Griggs and C M Kenworthy for Appellants A C Skelton for Respondents
Judgment:	22 October 2021 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to the respondents for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

Table of Contents

Introduction

[1] The appellants (together Alusi), the respondents (together Lawrence Dental) and a third party, Creative Dentistry Ltd (Creative) conducted separate dental practices from the same premises under a cost-sharing arrangement. Disputes arose when Lawrence Dental and Creative wished to sell their practices. The dispute between Alusi and Creative was settled, with Creative selling its practice to Alusi. The dispute between Alusi and Lawrence Dental was referred to arbitration before the Hon Paul Heath QC.

[2] The arbitrator delivered an interim award on 22 November 2019 (the Partial Award). Alusi complained that the Partial Award contained a finding for which there

was no evidential basis and that it was not given the opportunity to address the issue, which amounted to a breach of natural justice. It applied under art 34(2)(b)(ii) of sch 1 of the Arbitration Act 1996 to set aside that part of the Partial Award. Article 34(2)(b)(ii) limits recourse to a court in respect of arbitral awards to applications to set aside where the award is in conflict with the public policy of New Zealand, and even then, at the discretion of the court. A breach of natural justice in the course of an arbitral proceeding is treated as bringing the award into conflict with public policy.[1]

[3] Ellis J refused the application to set aside. She held that there had been no breach of natural justice and, in any event, the circumstances would not have warranted the exercised of the discretion to set aside part of the award.[2] Alusi appeals both aspects of the decision.

[4] Lawrence Dental supports the judgment on other grounds:

(a) The application to set aside was essentially a challenge to a finding of fact by the arbitral tribunal and not amenable to being set aside.

(b) Any breach of natural justice that might have occurred in respect of the arbitrator's finding is not sufficiently serious to reach the threshold required for the exercise of the discretion to set aside.

(c) The proper exercise of the discretion would not allow the part of the award to be set aside because of the principle of arbitral finality and/or because the matter in issue does not affect the overall outcome of the award and/or because of the cost and delays involved.

[5] The parties identified six issues arising on the appeal. Alusi identified three further issues that it wished to have determined but which Lawrence Dental says fall outside the scope of the appeal and in any event are questions of law that ought not to be determined on this appeal. We set those issues out later.

---

1 Arbitration Act 1996, sch 1, art 34(6)(b).

2 *Alusi Ltd v G J Lawrence Dental Ltd* [2020] NZHC 2409 [High Court decision].

Background

[6] The material before us contained little by way of evidence of the background events. Our outline of the events giving rise to the dispute is drawn from the Partial Award and from Ellis J's decision.

The Raumati Dental Centre

[7] Three dentists, Dr Lawrence, Dr Ibrahim and Dr Al-sabak, were practising from premises in Raumati, which was known as the Raumati Dental Centre. Their practices were independent of one another and the basis on which they shared the premises was recorded in a Deed of Association. The parties to the Deed were companies controlled by each of the dentists: Alusi Ltd (controlled by Dr Ibrahim), G J Lawrence Ltd (controlled by Dr Lawrence) and Creative Dentistry Ltd (controlled by Dr Al-sabak). The Deed recorded the parties' intention to share overheads but not to form a partnership.

[8] Clause 15 of the Deed dealt with the death or retirement of one of the parties. In relation to retirement, if any party wished to retire the remaining parties would have the right to purchase their interest in the association at current market value, which was to be determined by agreement or arbitration. The valuation was to be obtained and the right to purchase either exercised or declined by written notice given within one calendar month from the date of notification of the exercise of the right to purchase. If the remaining party or parties declined or refused to purchase, the retiring party was entitled to sell their share of the assets on the open market. If a sale on the open market was not finalised within three months from the date of the vendor's desire to retire, the affairs of the association were to be wound up.

[9] The cost sharing and other practical aspects of running the Raumati Dental Centre were managed through a separate company, Openyd Ltd. Lawrence Dental, Alusi and Creative were equal shareholders in Openyd Ltd and Drs Lawrence, Ibrahim and Al-sabak were directors. Openyd leased the premises, with each dentist meeting part of that cost. Openyd employed some of the staff, including the practice manager. Openyd (through the practice manager) invoiced patients, received income and

allocated expenses to each of the dental practices. Openyd held the bank accounts into which fee income was received and from which operating costs were paid.

[10] Any sale of a dental practice would be accompanied by a sale of the vendor's shares in Openyd. Clause 15 of the company's Constitution contained rights of pre-emption for the remaining shareholders. A director wishing to sell or transfer their shares was required to give notice to the directors. That notice deemed the directors to have been appointed agent of the proposed transferor to sell the shares to any other shareholders. The price was to be fixed either by agreement or by a specified process. The directors were then required to give notice to the other shareholders, inviting expressions of interest within 21 days. After 21 days the directors were required to apportion the shares amongst the shareholders who had expressed a desire to purchase pro rata according to the number of shares already held by them. If the shares were not taken up by existing shareholders within 60 days of the directors receiving notice from the proposed transferor, the latter was entitled to sell to an unrelated party.

[11] The structure established under the Deed and the Constitution had been in place for some years. Other dentists had bought and sold practices without problem.

Problems arise when Dr Lawrence wishes to retire

[12] In 2016 Dr Lawrence signalled his intention to retire. He offered his practice to Dr Ibrahim. Dr Lawrence already knew that Dr Al-sabak did not want to buy the practice. Instead, Dr Al-sabak wanted Alusi to acquire both Lawrence Dental and Creative.

[13] There were inconclusive negotiations between Lawrence Dental and Alusi. The three dentists met and reached an agreement that was recorded in an email of 15 March 2017 (the Email Agreement). The Email Agreement contemplated Alusi purchasing Lawrence Dental's practice with Creative's consent (either actual or deemed) and Creative negotiating for the sale of its practice to Alusi.

[14] The full terms of the Email Agreement were:

> 1. Alusi Limited [Dr Ibrahim] and [Lawrence Dental] shall sign the agreement for Sale and Purchase drafted at the meeting.

2. That Creative Dentistry Limited [Dr Al-sabak] will provide financial records to [Dr Ibrahim] with respect to his practice by 5pm, Friday 17 March 2017.

3. That [Dr Al-sabak] may now market his practice for sale to third parties (not party to the Deed of Association).

4. [Dr Al-sabak] shall, prior to accepting any offer for his practice offer his practice to [Dr Ibrahim] on the same terms.

5. [Dr Ibrahim] shall have three working days to make an offer on the same terms failing which [Dr Al-sabak] may sell his practice to that third party on the terms recorded in the original offer.

6. Subject to 5 above, in consideration for the above, [Dr Ibrahim] shall waive any right of pre emption pursuant to the Deed of Association and the Constitution of Openyd Limited and consent to such sale.

7. In the interim [Dr Ibrahim] and [Dr Al-sabak] shall negotiate in good faith regarding the sale of [Dr Al-sabak's] practice to [Dr Ibrahim].

8. [Dr Al-sabak] shall give further consideration to consenting to the sale of [Lawrence Dental] practice to Alusi Limited and shall confirm his position by 5pm Monday 20th March 2017.

9. [Dr Al-sabak's] consent to the sale of [Lawrence Dental] to Alusi Limited shall be deemed to be given if he enters into an unconditional contract for the sale of his practice.

[15] Alusi and Lawrence Dental immediately signed a sale and purchase agreement in anticipation of Creative's consent (the Lawrence ASP). The purchase price was $475,000. Although the agreement itself did not specify that it was conditional on Creative's consent, it contained provision for Dr Al-sabak to endorse his consent on the agreement and cls 8 and 9 of the Email Agreement made it clear that Dr Al-sabak's consent would be needed for the sale of Lawrence Dental to Alusi to proceed.

[16] However, Alusi did not agree to purchase Creative. Creative maintained that the sale to Lawrence Dental could not proceed until the procedure provided for under cl 15 of the Deed and the pre-emptive rights provisions of the Constitution had been complied with. It declined to waive those rights. Nevertheless, Alusi purported to declare the Lawrence ASP unconditional and tendered a deposit cheque. Lawrence Dental declined to accept the cheque (though did not return it). Alusi called on Lawrence Dental to either affirm the contract or return the cheque, thereby repudiating the contract. Lawrence Dental did neither. Alusi threatened specific performance proceedings but did not take any action.

[17] At Creative's behest, the dispute was referred to arbitration before Mr Sherwood-King. The questions for arbitrator included the "effect and enforceability" of the Lawrence ASP. In an award issued on 25 August 2017, Mr Sherwood-King found that under the Email Agreement:

> … the [Deed] and the constitution of Openyd Limited remain unchanged and the parties agreed to be bound by a subsequent agreement recorded in the [Email Agreement] which provided, in part, for Dr Ibrahim to consent to the sale of Creative to a third party and for Dr Al-Sabak to consider whether he would consent to the sale of Lawrence to Alusi and that he would confirm his position by 5pm on Monday 20th March 2017 …
>
> The [Lawrence ASP] expressly provided for the consent of Dr Al-Sabak to that sale. That consent having not been forthcoming from Dr Al-Sabak, the [Lawrence ASP] has no effect and is not enforceable.

[18] Within days of Mr Sherwood-King's award being issued, Dr Al-sabak advised that he had found a buyer for his practice. Creative wrote to Alusi and Lawrence Dental asking that they waive their pre-emptive rights under the Deed and the Constitution to enable Dr Al-sabak to sell. That led to the following: (1) Lawrence Dental returned Alusi's deposit cheque and advised that "for the avoidance of doubt" it was cancelling the Lawrence ASP "on the grounds of unenforceability"; (2) Lawrence Dental advised Creative that it reserved its position in relation to the proposed sale of its practice to the third party; and (3) Alusi advised Creative that the Email Agreement was still operative and before Creative could sell, it was obliged to make an identical offer to Dr Ibrahim.

[19] Creative maintained that the Email Agreement was no longer in force. Alusi applied for an injunction to prevent Creative selling its practice. Lawrence Dental was permitted to be joined to protect its position on the question whether the Email Agreement remained enforceable. In the end, Alusi agreed to buy Creative's practice and discontinued the proceeding. Therefore, the status of the Email Agreement was not determined.

[20] Lawrence Dental maintained that its rights of pre-emption under Openyd's Constitution meant that the sale could not proceed without its consent. It indicated that it would consider giving consent if Alusi agreed to conditions that would protect Lawrence Dental's position as a minority shareholder. They included amendment of

the Constitution to limit the number of directors in Openyd to two directors, one appointed by its interests and the other by Alusi's interests.

[21] Alusi did not agree to Lawrence Dental's proposal. It went ahead and settled its purchase of Creative's practice on 1 November 2017.[3] The agreement included the sale of Creative's shares in Openyd, conditional upon Creative obtaining the other shareholders' approval. Lawrence Dental maintained that Openyd's Constitution required Creative's shares in that company to be transferred equally to Alusi and Lawrence Dental. But Drs Ibrahim and Al-sabak purported to pass a board resolution approving the sale. This left Lawrence Dental as a minority shareholder.

The dispute between Lawrence Dental and Alusi escalates

[22] Relations between Alusi and Lawrence Dental continued to deteriorate. In November 2017 Lawrence Dental gave notice of its intention to sell its practice. This notice triggered Alusi's rights of pre-emption under the Deed. Lawrence Dental indicated a price of $550,000. But Alusi maintained that there already existed a binding agreement requiring Lawrence Dental to sell to it for $400,000.[4] Lawrence Dental did not accept this and treated Alusi's advice as a refusal to exercise its right of purchase.

[23] In early 2018, Alusi purported to exercise its control over Openyd to remove Mr Lawrence as a director and appoint Dr Ibrahim's son, Mr Abdulqadir, a director. In February 2018, after assertions by Lawrence Dental of breaches of the Deed, Lawrence Dental gave notice of cancellation of the Deed. Shortly afterwards, Openyd (under Alusi's control) purported to cancel Lawrence Dental's right to occupy the Raumati premises. The dispute was referred to arbitration before Mr Heath, with Lawrence Dental as the claimant.[5]

---

3 The sale to Alusi brought the High Court proceedings to an end. As we come to later, statements by Alusi's counsel in relation to costs in that proceeding are relevant to the current appeal.

4 It is not clear whether this was intended to be reference to the Lawrence ASP albeit with the price incorrectly stated or to a still earlier agreement.

5 Initially, Lawrence Dental had brought proceedings in the High Court seeking a declaration as to the status of the Deed, an order appointing a receiver of the association created by the Deed and separate proceedings to have Openyd placed in liquidator. Both proceedings were stayed on the basis that the dispute fell within the arbitration clause in the Deed: *G J Lawrence Dental Ltd v Alusi Ltd* [2018] NZHC 1342.

The Heath arbitration

The parties' positions in the arbitration

[24] The central issue in the arbitration was whether Alusi was entitled to assert effective control over Openyd as a result of purchasing Creative's shares. Lawrence Dental maintained that the pre-emptive rights conferred by the Deed and the Constitution meant that those occupying the Raumati Dental Centre were entitled to an equal say in the running of the Centre. It sought to assert those rights and contended that Creative's shares in Openyd should have been offered to it and Alusi equally. Had that occurred, Alusi would not have been a position to remove Mr Lawrence as a director or to take steps to exclude him from the Raumati Dental Centre.

[25] Alusi contended that Lawrence Dental had waived its rights of pre-emption under the Deed and the Constitution. Having acquired the majority of the shares in Openyd through the purchase of Creative's practice, it was entitled to exercise control over the management of the Centre.

[26] The arbitrator identified a number of preliminary questions that were expected to provide a framework for resolving the substantive issues. He answered those questions in the Partial Award.[6] Alusi's application to set aside was brought in relation to the arbitrator's answer to question (c), which asked:

> In the event that Lawrence Dental and Alusi were each to remain the owner of a practice under the 2012 Deed, has Lawrence Dental at any time waived or forfeited its pre-emptive rights under the Constitution of Openyd, or its rights and protections under the 2012 Deed?

[27] The parties' respective positions on this question are evident from their written submissions to the arbitrator. We note that the submissions were both dated 30 May 2019 and there were no reply submissions.

---

6 Alusi applied unsuccessfully for leave to appeal the Partial Award to the High Court under cl 5(2) of sch 2 to the Arbitration Act: *Alusi Ltd v G J Lawrence Dental Ltd* [2020] NZHC 739 [Leave decision]. Ellis J refused leave to appeal that decision to this Court under cl 5(5): High Court decision, above n 2. This Court refused special leave to appeal Ellis J's decision under cl 5(6): *Alusi Ltd v G J Lawrence Dental Ltd* [2021] NZCA 87 [Special leave decision].

[28] Lawrence Dental denied waiving its pre-emptive rights and pointed to its conduct throughout as being inconsistent with having done so. It perceived that Alusi's waiver argument rested on the Email Agreement. Responding to that perceived argument, it submitted (among other things) that by the time Creative sold its Openyd shares to Alusi, the Lawrence ASP had been validly cancelled and the Email Agreement no longer had any effect:

> 14.5 The [Sherwood-King] award … declared the [Lawrence ASP] to be of no effect and unenforceable …
>
> 14.6 Submitted: that also brought the provisions of the [Email Agreement] to an end because paragraphs 2 to 9 were machinery to achieve consent to the [Lawrence ASP] …
>
> …
>
> 14.9 If understood correctly, Alusi seeks to keep the [Lawrence ASP] alive beyond 1 November 2017; it apparently being the contention that Lawrence Dental's earlier "repudiation" by letter of 29 August 2017 … was not accepted until Mr Upton's submission of 13 December 2017. But his submission acknowledges the agreement was at an end before 14 September 2017. *It is further understood that Alusi wants the [Lawrence ASP] alive as at 1 November 2017 to avoid the suggestion that the alleged implied consent of Lawrence Dental under the [Email Agreement] to the Creative/Alusi sale lapsed at the point the [Lawrence ASP] died. As above, consent was never given by Lawrence Dental but in any event the [Lawrence ASP] was well dead by 1 November 2017.*
>
> (Emphasis added.)

[29] Alusi maintained that Lawrence Dental had waived its pre-emptive rights in relation to Creative's shares in Openyd through a combination of the Lawrence ASP and the Email Agreement. It argued that the combined effect of the Email Agreement and the Lawrence ASP amounted to an implied waiver by Lawrence Dental:

> [The Email Agreement] did not specify a process for Lawrence Dental to waive pre-emptive rights in respect of the sale of Creative to Alusi, because the combined effect of clauses 1 and 9 of [the Email Agreement] and [the Lawrence ASP] was that there was from that point a binding and enforceable contract for the sale of Lawrence Dental to Alusi as well. Lawrence Dental's agreement to those terms must constitute an implied waiver of any such rights.

After making a separate submission, based on the interpretation of the Constitution, that Lawrence Dental's decision not to purchase Creative's practice when offered constituted a waiver of its pre-emptive rights, Alusi added:

> In any case, it is respectfully submitted that [the Email Agreement] is a complete answer to any claim that Lawrence Dental's pre-emptive rights under clause 15 of the constitution were not respected. The shareholders agreed upon a process for the disposal of the relevant practices, including their shares, and they were at liberty to do so, even if that might be inconsistent with the strict terms of the constitution. Lawrence Dental is bound by that agreement.

[30] Alusi had dealt with Lawrence Dental's purported cancellation of the Lawrence ASP earlier in its submissions, asserting that it was a wrongful repudiation, which was accepted on 13 December 2017.[7] Therefore, both the Lawrence ASP and the Email Agreement remained on foot on 1 November 2017. Alusi's submissions did not, however, address the possibility raised in Lawrence Dental's submissions that if the Lawrence ASP had been cancelled before 1 November 2017, the Email Agreement ceased to have any effect at the same time. There appears not to have been any further submission made by Alusi to address that issue.

The arbitrator's decision

[31] The arbitrator recorded Alusi's argument as follows:

> [77] Alusi asserts that Lawrence Dental waived the benefit of the pre-emptive rights conferred by both clause 15 of the 2012 Deed and clause 15 of the Constitution. On its behalf, Mr Griggs submits that an unequivocal waiver is evidenced by a combination of words and conduct arising out of, and including, the [Email Agreement].
>
> [78] Mr Griggs' argument is premised on the notion that the [Email Agreement] superseded clause 15 of the 2012 Deed and clause 15 of the Constitution. That is because the shareholders of Openyd unanimously agreed to a course of action that departed from the pre-emptive rights process conferred by the 2012 Deed and the Constitution, and rendered compliance with one or both of those provisions unnecessary. … This [argument] can only succeed if the [Email Agreement] remained live as at 1 November 2017.

[32] The arbitrator went on to state issue as follows:

> [109] It is accepted that, to prove a waiver of the pre-emptive rights by Lawrence Dental, Alusi must satisfy me that Lawrence Dental unequivocally forfeited those rights. *That is the basis on which I approach the question whether the [Email Agreement] amounted to a waiver that remained in place at the time the Creative Dentistry/Alusi agreement was settled on 1 November 2017.* If it were, the sale from Creative Dentistry to Alusi would have triggered the constructive consent provision in clause 9 of the [Email Agreement].

---

7 This was the date on which its counsel in the High Court proceedings against Creative filed his submissions on costs in which he acknowledged that the Lawrence ASP had been cancelled.

> [110] There are two distinct aspects involved in the waiver analysis:
>
> (a) The first is whether the [Email Agreement] and the [Lawrence ASP] had been cancelled before 1 November 2017;
>
> (b) The second is whether, sometime before 1 November 2017, a reasonable time had passed within which Alusi could trigger the constructive consent by settling a purchase of Creative Dentistry's practice and shares in Openyd.
>
> (Emphasis added.)

[33] The arbitrator interpreted Mr Sherwood-King's conclusion that the Lawrence ASP was unenforceable as meaning simply that the agreement could not be enforced until the condition in the Email Agreement requiring Creative's consent had been satisfied. Therefore, the Lawrence ASP could have been enforced had Dr Al-sabak's consent been given expressly or been deemed to have been given under cls 8 and 9 of the Email Agreement. It followed that Lawrence Dental's purported cancellation of the Lawrence ASP in August 2017 was a wrongful repudiation.

[34] The arbitrator then turned to the question "whether, by words or conduct, Alusi accepted [Lawrence Dental's] repudiation and thereby cancelled [the Lawrence ASP]. There was no evidence of any communication by or on behalf of Alusi to Lawrence Dental showing acceptance by Alusi of the repudiation. However, Lawrence Dental had argued that evidence of acceptance of the repudiation prior to 1 November 2017 could be found in a submission made on behalf of Alusi by its counsel in the earlier High Court proceedings brought by Alusi against Creative into which Lawrence Dental had been joined.

[35] Following Alusi's discontinuance of those proceedings, Creative and Lawrence Dental both sought costs against Alusi. Mr Upton QC, for Alusi, filed a memorandum in response to the applications. In relation to Creative's applications, he said:

> … Alusi submits that the [Email Agreement] continued to have relevance in the context of any sale by Creative to a third party, irrespective of what happened to the [Lawrence ASP]. The two were not linked or conditional in some way, contrary to what appears to be suggested by Creative. If the [Email Agreement] only applied in the context of a sale by Lawrence to Alusi (as suggested by Creative), there would have been no point in paragraphs 2 to 7 of the [Email Agreement], and in any event (if there was such a link) surely the agreement would have said so.

And in relation to Lawrence Dental, Mr Upton said:

> By the time Creative and Alusi entered into their contract on 14 September 2017 (in fact well before then), the earlier Lawrence/Alusi contract (referred to in paragraph 1 of the [Email Agreement]) was dead and buried, and could not be revived;
>
> …
>
> … By the time that Creative and Alusi entered into their contract for the sale and purchase of Creative's dental practice (14 September 2017), there was no extant contract of sale and purchase in existence as between Lawrence and Alusi for reasons already explained.

[36] The arbitrator accepted that Mr Upton's submission was binding on Alusi.[8] But whereas Lawrence Dental had invited the arbitrator to find that the submission was evidence of Alusi having accepted the repudiation of the Lawrence ASP (reflecting Mr Upton's submissions), the arbitrator wrongly recorded the submission and treated it as evidence of both the Lawrence ASP and the Email Agreement having been cancelled:

> [123] … senior counsel stated, in a memorandum on costs filed on 13 December 2017, that the [Email Agreement] and the [Lawrence ASP] were "dead and buried" by "the time [Creative Denistry] and [Alusi] entered into their contract …

[37] On the basis of that error, the arbitrator went on to make a finding that Alusi had accepted Lawrence Dental's repudiation of the Email Agreement, with the result that the Email Agreement was cancelled:

> [126] Based on senior counsel's statements to the Court when making submissions for Alusi in opposition to the costs application, I am satisfied that *Alusi accepted Lawrence Dental's repudiation of the [Email Agreement] on or about 14 September 2017*. As a result, that agreement was cancelled from that time, and neither party had, as at 1 November 2017, any obligation to perform it further.
>
> (Emphasis added, footnote omitted.)

[38] The arbitrator went on to consider whether, if he was wrong in his conclusion "on the cancellation point", the Email Agreement was of no effect due to the effluxion of time. Relying on the Supreme Court's statement in *Steele v Sereposis* that, in respect of conditional contracts, the relevant party has an obligation to take all

---

8 Relying on *Carrell v Carrell* [1975] 2 NZLR 441 (SC) at 445–446.

reasonable steps to achieve fulfilment of the condition within a reasonable time, the arbitrator considered whether Alusi had taken all reasonable steps to fulfil the condition in the Lawrence ASP requiring Dr Al-sabak's consent to the purchase of Lawrence Dental.[9] He made a number of observations about the strict time frame fixed to implement the Email Agreement, particularly the condition precedent for the Lawrence ASP, and concluded that:

> [132] While I infer, in Alusi's favour, that the commencement of its negotiations with Creative Dentistry was intended to meet the condition precedent, by the time those parties agreed terms, on or about 14 September 2017, I consider a reasonable time had passed for fulfilment. I reach that conclusion on the basis of the parties' expectations that resolution would follow swiftly from the [Email Agreement]. Dr Ibrahim's interests have no one but themselves to blame for not attempting to fulfil the condition earlier; I repeat that some three to four months were lost while Alusi persisted with a weak argument that contended that the [Lawrence ASP] was unconditional.

[39] The arbitrator then reached his overall conclusion on the question he had posed:

> … Lawrence Dental did not waive the pre-emptive rights conferred by the 2012 Deed or the Constitution before or after Alusi purported to purchase Creative Dentistry's business and its shares in Openyd.

The case in the High Court

[40] Alusi applied to set aside the arbitrator's finding that the Email Agreement had been cancelled by 14 September 2017. It argued that the arbitrator had conflated the Lawrence ASP and the Email Agreement and the finding came as a complete surprise — it had not been given the opportunity to address the point. Given that this was the basis for the arbitrator's decision, there was obvious prejudice.

[41] However, the Judge was satisfied that Alusi's position at the arbitration was, implicitly, that the Lawrence ASP and the Email Agreement were inextricably linked and both were live as at 1 November 2017.[10] She commented that, at the arbitration, "there was no suggestion that the Email Agreement might have independent life".[11] In the Judge's view, Alusi's claim that it had not accepted Lawrence Dental's

---

9 *Steele v Sereposis* [2006] NZSC 67, [2007] 1 NZLR 3 at [45]–[46].
10 High Court decision, above n 2, at [67]–[68].
11 At [49].

repudiation of the Lawrence ASP until after 1 November 2017 could only advance its position if the Email Agreement was also on foot until after 1 November 2017.[12] She explained that the intertwining of the Email Agreement and the Lawrence ASP meant that the ongoing existence of both were in issue and, as a result, the arbitrator's treatment of them did not create any breach of natural justice:

> [68] … It is clear that the only reason Alusi cared about the currency of the Lawrence ASP was to avoid any suggestion that, because the Lawrence ASP was terminated, Lawrence Dental's implied consent to the Creative/Alusi sale by virtue of the Email Agreement had also lapsed. And as a matter of law and logic, that must be so; as far as Lawrence Dental was concerned, the Lawrence ASP and the Email Agreement are undoubtedly a "package" in that sense. The idea that Lawrence Dental would have agreed to waive its pre-emptive rights without a firm agreement for the sale of its own practice makes no sense. It was, no doubt, for this reason that the focus of argument before the arbitrator was largely on the Lawrence ASP.
>
> [69] *If the Lawrence ASP was spent by 1 November, then so too was the Email Agreement. Although not expressly made clear in the Award, that was also plainly the arbitrator's view.* As noted earlier, the Lawrence ASP and the Email Agreement are referred to either together. or interchangeably, throughout the award. When read in light of the analysis and discussion that precedes paras [126] and [127], it seems quite plain that the reference to the "email agreement" was intended to include the Lawrence ASP. Indeed, the discussion immediately preceding those two paragraphs focuses entirely on the issues of whether the Lawrence ASP (not the Email Agreement) had been repudiated and cancelled.
>
> [70] In my view this is a complete answer to the alleged breach of natural justice. The issue before the arbitrator was whether Lawrence Dental had at any time waived or forfeited its pre-emptive rights under the Constitution or the Deed. The principal basis on which waiver was argued related to the combined effect of the Lawrence ASP and the Email Agreement. The main impediment to that argument was Mr Upton's concession that the Lawrence ASP was "dead and buried" well before 1 November. Alusi knew that: it addressed the point fully in their submissions.
>
> (Emphasis added, footnote omitted.)

[42] The Judge acknowledged that Alusi may have been surprised by the reference to the Email Agreement rather than the Lawrence ASP in [126] and [127] of the award. She also acknowledged that Alusi had not separately addressed the possibility of the Email Agreement remaining in force after the Lawrence ASP had come to an end. But she did not consider these to have any significance because (1) Alusi's position was clearly that the Lawrence ASP was not at an end and (2) it would not have been tenable

---

12 At [47].

to argue that the Email Agreement could survive the cancellation of the Lawrence ASP.[13]

[43] The Judge concluded:

> [72] … I do not regard the "surprise" as either material or potentially prejudicial; there has been no breach of natural justice here.

[44] The Judge added that if she was wrong in her conclusion she would not have exercised her discretion in Alusi's favour because, given the arbitrator's alternative finding that the Lawrence ASP had expired due to the effluxion of time, any breach of natural justice would have had no effect on the outcome.[14]

Issues on appeal

[45] The issues agreed by the parties for the purposes of the appeal are:

(a) Issue 1: is the alleged absence of any evidence to support an arbitral tribunal's finding of fact grounds to set aside part of an award under article 34(2)(b)(ii) of Schedule 1 to the Arbitration Act?

(b) Issue 2: if the answer to Issue 1 is "yes", did the High Court err in the judgment at [70] and [72] in holding that there was no breach of natural justice?

(c) Issue 3: if the answer to Issue 2 is "yes":

(i) Is an award in conflict with public policy for the purposes of art 34(2)(b)(ii) of sch 1 to the Act if any breach of natural justice occurs in connection with the making of that award or is there a threshold for finding that such a breach has put the award in conflict with public policy?

(ii) Did this breach render the award in conflict with public policy?

---

13 At [71].
14 At [73].

(d) Issue 4: if the answer to Issue 3 is "yes", did the High Court err in the judgment at [73] in holding that it would not exercise its discretion to set aside the relevant part of the award?

(e) Issue 5: if the answer to Issue 4 is "yes", should part of the award be set aside after taking into account all relevant criteria for the exercise of discretion?

(f) Issue 6: if the answer to Issue 5 is "yes", should the part of the award to be set aside be limited to [123] to [126], or should it extend to the whole of that part of the award which relates to the pre-emptive rights issue?

[46] Alusi's three further issues, which Lawrence Dental resists on the basis that they are outside the scope of the appeal, are:

(g) Issue 7: did the High Court err in the judgment at [70] in holding that the effect of Mr Upton's representation was the cancellation of the Lawrence ASP prior to 1 November 2017?

(h) Issue 8: did the High Court err in the judgment at [94] in holding that the Email Agreement is a conditional contract, conditional on the currency of the Lawrence ASP?

(i) Issue 9: if the answer to Issue 8 is "no", does the rule in *Humphries v Carr* (that a party to a contract cannot take advantage of its own wrong) preclude Lawrence Dental from gaining a benefit from its repudiation of the Lawrence ASP, by avoiding the waiver of its pre-emptive rights under the Email Agreement?[15]

---

15 *Humphries v Carr* [2011] NZCA 314, [2012] 1 NZLR 742.

Issue 1: is the alleged absence of any evidence to support an arbitral tribunal's finding of fact grounds to set aside part of an award under article 34(2)(b)(ii) of Schedule 1 to the Arbitration Act 1996?

[47] Article 34 relevantly provides:

> **34 Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if —
>
> …
>
> (b) The High Court finds that —
>
> …
>
> (ii) the award is in conflict with the public policy of New Zealand.
>
> …
>
> (6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if —
>
> …
>
> (b) a breach of the rules of natural justice occurred —
>
> (i) during the arbitral proceedings; or
>
> (ii) in connection with the making of the award.

[48] Lawrence Dental submits that Alusi's challenge to the arbitral award is, in reality, a challenge to the arbitrator's finding of fact and not capable of amounting to a breach of natural justice. Therefore, the complaint falls outside the scope of art 34(2)(b)(ii). It supports this submission by reference to art 5 of sch 2, which governs appeals against arbitral awards.[16] Article 5 limits appeals against arbitral awards to any question of law which "does not include any question as to whether … the award or any part of the award was supported by any evidence or any sufficient or

[16] The rules contained in sch 2 apply under the Agreement to Arbitration between the parties.

substantial evidence".[17] Lawrence Dental says that this provision applies by analogy to applications to set aside.

[49] Generally, errors of fact by an arbitrator are not amenable to challenge.[18] However, Alusi frames the arbitrator's error as a breach of natural justice, being a finding of fact made with no evidential foundation which resulted in a finding that was not argued for and came as a complete surprise to it. It does not accept that art 5 can constrain the power to set aside an award for breach of natural justice. Alusi relies on the statement in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* regarding the requirements of natural justice that:[19]

> … the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value …
>
> …
>
> … What is required … is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding …

[50] The decision under challenge in *Re Erebus Royal Commission* was, however, very different to the present case — a finding, in the context of a Royal Commission, of grave misconduct by senior executives of an airline who had no opportunity to respond to the allegation. The present arbitral context is quite different. Natural justice is concerned with procedural fairness and what constitutes natural justice in any given case may vary with the context. A complaint of breach of natural justice in the arbitral context is to be considered with the nature and purpose of that process in mind. This Court observed in *Methanex Motunui Ltd v Spellman:*[20]

> … the purpose of the principles of natural justice in the arbitration context … is to do justice between the parties rather than to insist on an absolute standard of fairness.

[51] Fisher J's observations in *Trustees of Rotoaira Forest Trust v Attorney-General* as to the specific expectations are apt.[21] The Judge adopted as the basic requirements

---

17 Arbitration Act, sch 2, art 5(10)(b)(i).

18 Under art 19(2) of sch 1 the assessment of evidence is entirely the province of the arbitral tribunal.

19 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 671 (emphasis in original).

20 *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at [141] (citation omitted).

21 *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC).

for a fair hearing those identified in Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, namely: fair notice of the hearing; a reasonable opportunity to be present with advisers and witnesses; a reasonable opportunity to present evidence and argument; reasonable opportunity to test the opponent's case by cross-examination, rebuttal evidence and argument; and unless otherwise agreed, the parties must present the whole of their evidence and argument at the hearing.[22] The Judge then added:[23]

> In addition the arbitrator must confine himself to the material put before him by the parties unless the contrary is agreed … This extends to the arbitrator's own opinions, ideas and knowledge where either party might otherwise be taken by surprise to that party's prejudice. If the arbitrator unexpectedly decides the case on a point which he has invented himself he creates surprise and deprives the parties of their right to address full argument to the case which they have to answer …
>
> …
>
> Once it is shown that the fact or idea introduced by the decision maker had not been reasonably foreseeable, it will be a very short step indeed to the possibility that a party was procedurally prejudiced.

[52] It is apparent from *Re Erebus Royal Commission* that a finding of fact made without any evidential foundation is capable of producing a breach of natural justice. But in the arbitral context that would only arise where the error led to genuine injustice between the parties. The mere fact of such an error does not, in itself, justify that conclusion.

[53] Nor is it necessary to consider in any detail Lawrence Dental's argument that art 5 of sch 2 precludes Alusi's application to set aside. It is not contentious that a finding of fact may amount to an error of law, though such cases will be rare — where there is no evidence to support the determination or where the evidence is inconsistent with and contradictory of the determination.[24] Alusi complains of the former. Whether the complaint can be sustained is a separate issue.

---

22 At 459, citing Michael J Mustill and Stewart C Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989) at 302.

23 At 460 and 462 (citations omitted).

24 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26], citing *Edwards v Bairstow* [1956] AC 14 (HL) at 36.

Issue 2: did the Judge err in finding that there was no breach of natural justice?

[54] Alusi submitted that the Judge erred by:

(a) finding that there had been no suggestion before the arbitrator that the Email Agreement had an "independent life" separate from the Lawrence ASP;

(b) finding that the Email Agreement was inextricably linked with Lawrence ASP and could not survive the cancellation of the Lawrence ASP;

(c) overlooking the importance of Mr Upton's submissions; and

(d) concluding that, although Alusi had been taken by surprise by the arbitrator's finding, that outcome was neither material nor potentially prejudicial.

[55] As to the first, Mr Griggs submitted that both Mr Upton's memorandum and Mr Griggs' own submissions in the High Court had described the Email Agreement and Lawrence ASP as two separate documents. It is true that Mr Upton used the phrase "were not linked", but he did so in relation to Creative's costs application, responding to Creative's suggestion that Alusi had waived its pre-emptive rights under the Email Agreement. We read the statement as meaning that the Creative contract (for sale to a third party) and the Lawrence ASP were not linked — that is, the effect of the Email Agreement on Creative's position was not tied to the fate of the Lawrence ASP. It was not directed towards the status of the Email Agreement in relation to the Lawrence ASP. Relevantly, Mr Upton said:

> Fundamental to Alusi's position is that any sale by Creative to a third party had to be in terms of the [Email Agreement], and not under the pre-emptive provisions of clause 15 in the Deed of Association.
>
> … Alusi submits that the [Email Agreement] continued to have relevance in the context of any sale by Creative to a third party, irrespective of what happened to the [Lawrence ASP]. The two were not linked or conditional in some way, contrary to what appears to be suggested by Creative. If the [Email Agreement] only applied in the context of a sale by [Lawrence Dental] to Alusi (as suggested by Creative), there would have been no point in paragraphs 2 to

> 7 of the [Email Agreement] and in any event (if there was such a link) surely the agreement would have said so.

[56] Nor do we read Mr Upton's submissions in relation to Lawrence Dental's costs application as suggesting that the Email Agreement and the Lawrence ASP were independent of one another. Mr Upton recorded Lawrence Dental's concern as being that:

> … if Creative achieved a sale, Alusi could then invoke paragraph 9 of the [Email Agreement] as a deemed consent to [Lawrence ASP] (it appears) 15 March 2017, referred to at paragraph 1 of the [Email Agreement], and "thus resurrect the sale in that paragraph 1".

Mr Upton then made four points to show that Lawrence Dental's concern was not justified. These included the fact that by September 2017 the Lawrence ASP was "dead and buried" and that:

> … even if consent were deemed in terms of paragraph 9 of the [Email Agreement], that does not address the underlying issue of whether there was an extant and enforceable contract of sale (as between Lawrence and Alusi) to which the consent could attach. By the time Creative and Alusi entered into their contract for the sale and purchase of Creative's dental practice (14 September 2017) there was no extant contract of sale and purchase in existence as between Lawrence and Alusi for reasons already explained.

[57] The inference to be drawn from this submission is that continued existence of the Email Agreement could not result in the Lawrence ASP, which was "dead and buried" being brought back to life. We accept that Mr Upton was treating the Email Agreement and the Lawrence ASP as separate — but for the purpose of neutralising any suggestion that the Email Agreement would be used to resurrect the latter. However, that was not the issue before the arbitrator.

[58] The parties' submissions to the arbitrator were both couched in terms of the two agreements being linked, though their perspectives were different. Alusi's position was that both the Lawrence ASP and the Email Agreement were on foot on 1 November 2017 and the combination of them amounted to a waiver by Lawrence Dental of its pre-emptive rights. Lawrence Dental maintained that the Lawrence ASP had been cancelled before 1 November 2017 and had the effect of bringing the Email Agreement to an end.

[59] There was no suggestion in Alusi's submissions, even as a fall-back argument, that if the Lawrence ASP was no longer on foot the Email Agreement alone could have the effect of a waiver. This was no doubt because the focus of the contest was over the status of the Lawrence ASP. But we consider the Judge was right to say that it was implicit in Alusi's position at the arbitration that the Lawrence ASP and the Email Agreement were linked.

[60] Mr Grigg's second point was that the Judge's acknowledgement at [68] — that in the hearing before her he had resisted the suggestion that the Email Agreement and the Lawrence ASP were inextricably linked — created an internal inconsistency with the findings at [47] and [49] that there was no suggestion the email agreement had "independent life". We do not agree. The Judge's comments at [47] and [49] related to the position Alusi had taken in the arbitration and, as already discussed, accurately reflect that position.

[61] We do not accept Mr Grigg's third criticism, that the Judge overlooked the importance of Mr Upton's submissions. The Judge properly considered the submissions and gave a reasoned explanation for her view. The inference the Judge drew about Alusi's position at the arbitration clearly took into account Mr Upton's submissions and was open to her.

[62] Nor do we accept that the Judge erred in concluding that, although Alusi may have been surprised at the arbitrator's finding, it was not prejudiced by it. Given Alusi's position at the arbitration that the combined effect of the Email Agreement and the Lawrence ASP produced a waiver by Lawrence Dental of its pre-emptive rights, the Judge was right to take the view that Alusi could only succeed in proving the waiver by showing that both were on foot as at 1 November 2017.

[63] It is true that, in relation to its application for leave to appeal an earlier decision[25] on other aspects of the arbitration, Alusi had argued that although the Lawrence ASP was conditional on Creative's consent, the Email Agreement was not

---

[25] That decision being Alusi's unsuccessful application for leave to appeal the Partial Award on questions of law under cl 5(2) of sch 2 to the Arbitration Act: Leave decision, above n 7.

and it therefore remained live on 1 November 2017 even if the Lawrence ASP had been cancelled by then.[26] But the Judge rejected that argument:[27]

> It is inconceivable that Lawrence Dental could continue to be bound by the Email Agreement upon the expiry of the Lawrence ASP. From Lawrence Dental's perspective, the Email Agreement *was* conditional — on the currency of the Lawrence ASP.
>
> (Emphasis in original.)

[64] Before us, Mr Griggs submitted that the Lawrence ASP and the Email Agreement were "interrelated but not conditional" and therefore the Email Agreement did not fall away just because the Lawrence ASP did. But he also accepted that, even if the Lawrence ASP had become unconditional on 1 November 2017, the purpose and effect of the Email Agreement was at an end because it had no further work to do.

[65] Mr Griggs did not articulate the basis on which the Email Agreement would remain on foot after the Lawrence ASP had ended. Instead, the nub of Alusi's complaint was that treating the Email Agreement as falling along with the Lawrence ASP would allow Lawrence Dental to benefit from its wrongful repudiation by avoiding the consequences of its waiver. But this is not sufficient. Mr Griggs accepted that the consequences of repudiation is to confer on the innocent party the right to accept the repudiation and seek damages as opposed to performance. Thus, the repudiation could not advantage Lawrence Dental. Rather, it was Alusi's acceptance of the repudiation that ended the Email Agreement as between it and Lawrence Dental.

[66] Lawrence Dental had explicitly posited that cancellation of the Lawrence ASP's prior to 1 November 2017 had the effect of bringing the Email Agreement to an end. That proposition rested on the purpose of the Email Agreement in terms of the overall scheme between the parties. It was open to the arbitrator to have treated the Email Agreement and the Lawrence ASP as linked, even on a correct reading of Mr Upton's memorandum. We therefore see no error in the Judge's conclusion that any surprise experienced by Alusi was not material — the outcome would have been the same had the finding been directed specifically towards the Lawrence ASP.

---

26 High Court decision, above n 2, at [92]–[93].
27 At [94] (emphasis in original).

[67] To summarise, both the arbitrator and the Judge were entitled to conclude that the Email Agreement and the Lawrence ASP were linked and that acceptance by Alusi of Lawrence Dental's repudiation of the Lawrence ASP would bring the Email Agreement to an end. This finding was not affected by the erroneous reading of Mr Upton's memorandum; the fate of the Email Agreement was a function of the Lawrence ASP being cancelled. The Judge was therefore right to hold that there had been no prejudice to Alusi as a result of the arbitrator's error and no breach of natural justice.

The other issues

[68] The remaining agreed issues 3–6 are predicated on our concluding that the Judge erred in finding that there was no breach of natural justice. Since we agree with the Judge's conclusion those issues do not arise for determination.

[69] Nor will we consider the additional issues 7–9 that Alusi raises. They were not raised in the notice of appeal and, in any event, concern questions of law which are outside the scope of this appeal, which is concerned with procedural fairness, not errors of law.

[70] Mr Griggs raised with us the fact that earlier this year Alusi applied unsuccessfully for special leave to appeal the decision on questions of law arising from the same errors complained of in the present appeal.[28] This Court considered that the threshold for special leave was not met and Ellis J's decision was not plainly wrong. In declining leave, the Court observed that the decision on the status of the pre-emptive rights would be reviewed in the context of the present, as of right, appeal.[29]

[71] It is not clear whether the differences in scope between the appeal for which special leave was being sought and the present appeal were expressly canvassed in the context of the application for leave to appeal. It can, however, be assumed that both counsel and the Court were cognisant of the limitations of the as-of-right appeal. It

---

28 Special leave decision, above n 7.
29 At [40].

cannot have been contemplated that we would consider questions of law that lie outside the permitted statutory scope and there is no basis on which to do that.

Result

[72] The appeal is dismissed.

[73] The appellants must pay costs to the respondents for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Lawler & Co, Auckland for Appellants
Gillespie Young Watson, Lower Hutt for Respondents